IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-351

CECIL D. CLAY, *et al., Petitioners,*

vs.

MARION HAYWARD, *et al., Respondents.*

BRIEF IN OPPOSITION TO CERTIORARI

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INDEX

Page

I. The District Court Correctly Held That The Separate Freeholder Box Violates the Equal Protection Clause as a Property Qualification on Right to Vote 2

II. The District Court Was Correct in Holding That the Unconstitutional Provisions Should Be Severed From the Valid Portion of the Statute 5

Conclusion 8

TABLE OF CITATIONS

Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973) 3
Bishop v. Wood, 426 U.S. 341 (1976) 5
Board of Educ. v. Maloney, 83 N.M. 167, 477 P.2d 605 (1970) 7
Cipriano v. City of Houma, 395 U.S. 701 (1969) 2, 4
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) . 2, 4
Cothran v. West Dunklin Public Sch. Dist. No. 1-C, 189 S.C. 85, 200 S.E. 95 (1938) 2, 3, 5, 6
Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1960) 7
Gordon v. Democratic Executive Comm. of Charleston, 335 F. Supp. 166 (D.S.C. 1972) 6
Harper v. State Board of Elections, 383 U.S. 662 (1966) 2
Hayward v. Clay, C.A. No. 76-2304 (D.S.C. June 9, 1977), *aff'd*, 573 F.2d 187 (4th Cir. 1978) 6
Hill v. Stone, 421 U.S. 289 (1975) 2, 3, 4, 5, 6
Kramer v. Union Free School District, 395 U.S. 621 (1969) 2, 4
Parker v. Bates, 216 S.C. 52. 56 S.E.2d 723 (1949) 7
Salyer Land Co. v. Tulare Water Storage District, 410 U.S. 719 (1973) 3
State v. City of Miami Beach, 245 So.2d 863 (Fla. 1971) 7
Stone v. Stovall, 377 F. Supp. 1016 (N.D. Texas 1974) 7
Tornillo v. Dade Co. School Bd., 458 F.2d 194 (5th Cir. 1972) 6
Turner v. Fouche, 396 U.S. 346 (1970) 2

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The writ of certiorari should be denied because this case presents no issues worthy of review by this Court.

This case involves an application of the familiar proposition that general-purpose elections may not be limited to freeholders (*i.e.*, landowners). The district court held that South Carolina's municipal annexation statute was unconstitutional on these grounds, and the court of appeals affirmed. In addition, based on its analysis of state law, the district court held that the freeholder referendum was severable from the remaining, constitutional portion of the annexation statute, and the court of appeals affirmed this portion of the judgment as well. The lower courts were correct as to both questions, one of which (the constitutional question) is a familiar one that does not warrant further examination in this case, while the other (the severability question) is no more than a question whether the federal courts have correctly construed state law.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE SEPARATE FREEHOLDER BOX VIOLATES THE EQUAL PROTECTION CLAUSE AS A PROPERTY QUALIFICATION ON THE RIGHT TO VOTE

The fourteenth amendment to the Constitution of the United States bars a state from conditioning the right to vote upon ownership of wealth or property.[1] That principle has been stated and restated by this Court no fewer than six times in the past few years (not counting per curiam opinions):

Hill v. *Stone*, 421 U.S. 289 (1975);

City of Phoenix v. *Kolodziejski*, 399 U.S. 204 (1970);

Turner v. *Fouche*, 396 U.S. 346 (1970);

Cipriano v. *City of Houma*, 395 U.S. 701 (1969);

Kramer v. *Union Free School District*, 395 U.S. 621 (1969);

Harper v. *State Board of Elections*, 383 U.S. 662 (1966).

The South Carolina Supreme Court has likewise held, in *Cothran* v. *West Dunklin Public Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938), that a statute limiting the right to vote to property owners violates the State Constitutional provisions regulating suffrage.

The features of the freeholder referendum required under the South Carolina annexation law are even more

[1] Contrary to suggestions in the Petition for Certiorari, *e.g.*, p. 19, homeowners are *not* penalized or excluded. As the district court said, "in the present case, all registered electors, including property owners, vote in the regular annexation election, while only the property owners may vote in the freeholders referendum." Pet. App. p. B-3.

restrictive than the property qualifications struck down in the earlier cases. In this case, eligibility is limited to owners of *real* property. In *Hill* and *Cothran*, the property qualification could be met by owning and reporting for taxes *any* property, real or personal, even "a pair of shoes or a bicycle," 421 U.S. at 303 (Rehnquist, J., dissenting). A majority of this Court rejected even this minimal curb on voting, and the dissenters in *Hill* indicated that had it been a real property qualification they too would have held it "impermissible." 421 U.S. at 308.

The district court correctly applied these familiar rules when it held that "in the present case some of the electors were allowed to vote once and some were allowed to vote twice. The differentiating criterion is property and that criterion is invalid." Pet. App. p. B-5.

The appellants argue that this case is different from the others because annexations are not like bond issues, Petition, pp. 18-19, or because non-freeholders are allowed to vote in the voters' box. Petition, pp. 19-20. The courts below addressed both these arguments, and correctly rejected them:

(1) This Court has acknowledged the possibility of a property qualification in elections of purely special interest to property holders, but that exception has been applied only in the case of water storage districts, having no governmental powers other than the proprietary ones of acquiring and distributing water for agricultural purposes. *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973); *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743 (1973). This exception has

been rejected in cases involving school district elections (*Kramer*), revenue bonds (*Cipriano*), and general obligation bonds (*Phoenix, Hill*). The *Hill* case contains an extended analysis of the limited nature of the "special interest election" exception, 421 U.S. 298-301. From this discussion it is clear that the election in this case, which decides whether the people of an area will become part of the neighboring city—and thereby subject to its laws and its government, and entitled to its services—is perhaps the clearest kind of *general* interest election that one could imagine:

> ". . . the present case deals with annexation, a decision of general political interest which will have a pervasive effect upon every citizen in the area to be annexed. Annexation not only involves changes in taxation, police and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself." Pet. App. p. B-6.

(2) This case, like *Hill* v. *Stone,* involves a dual-box election. That is, non-freeholders are "allowed" to vote, but their votes cannot be decisive since there is a simultaneous election for which a property qualification is imposed. "Success in a freeholders' election is essential to the annexation procedure and the franchise in the freeholders referendum is limited to property owners." Pet. App. p. B-4. The petitioners refer to the freeholders referendum as part of the "qualification" procedure, as if that term made it less of an election. But the essential criteria of an election—ascertaining the preference of a majority of those casting ballots—are present, and the district court was therefore correct in treating the freeholders referendum like any other

election.[2] The *Hill* Court held that the existence of the renderers box disfranchised those who were ineligible for it, and a like analysis requires invalidation of the freeholders box in this case.[3]

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE UNCONSTITUTIONAL PROVISIONS SHOULD BE SEVERED FROM THE VALID PORTION OF THE STATUTE

In addition to enjoining further enforcement of the freeholder referendum provision, the district court also upheld the election that had already taken place, because the constitutional portions of the state annexation procedure (the registered voters' election) had been duly carried out. In reaching this result, the district court made an explicit finding that the freeholder provision could be severed from the remainder of the statute. That finding, made by an experienced judge who was formerly a member of the South Carolina General Assembly, and affirmed by the court of appeals, is entitled to great weight. See *Bishop* v. *Wood,* 426 U.S. 341, 345-46 (1976).

The holding that the statute was severable conformed to the rule followed by the South Carolina Supreme Court itself in *Cothran* v. *West Dunklin Public School*

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[2] The South Carolina Supreme Court likewise uses the terms "election" and "referendum" interchangeably. E.g., Murphree v. Mottel, 267 S.C. 80, 84, S.E.2d 36, 37 (1976).

[3] Petitioners also cite statutes from other states dealing with non-elective freeholder *petition* requirements. Those provisions of course are not involved here. As the court of appeals correctly recognized:

> "Of course, South Carolina need not grant anyone the right to vote on annexation; . . . But once the right to vote is established, the equal protection clause requires that, in matters of general interest to the community, restriction of the franchise on ground other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest." Pet. App. p. A-4.

District, supra.[4] There, a bond issue had been carried in Greenville County, S.C., by a majority of the registered voters, even though the authorizing statute limited the vote to property taxpayers only. The South Carolina Supreme Court held the property taxpayer limitation unconstitutional but upheld the remainder of the law authorizing the bond issue election and held the election valid:

> "It [the provision limiting the vote to property taxpayers] therefore had no application to the election held on the 19th of September, 1938. The election was legal and valid, and the bonds so voted may lawfully be issued." [189 S.C. at 91, 200 S.E.2d at 97]

Severability appears to be the universal rule in freeholder cases. The order in *Hill* v. *Stone, supra,* was one

[4] Although the District Court here did not elaborate on its holding of severability in its initial order, it subsequently gave a further discussion in an order enjoining the relitigation of this case in state court:

"While the South Carolina Supreme Court has not construed these statutes directly, it has spoken in an extraordinarily similar case, where it held an unconstitutional freeholder provision severable from the rest of bond issue election law, and held a bond issue valid after it had been approved by the registered voters only. Cothran v. West Dunklin Public School District, 189 S.C. 85, 200 S.E. 95 (1938). See also Gordon v. Democratic Executive Comm. of Charleston, 335 F. Supp. 166 (D.S.C. 1972), an election case in which this court held that statutes are to be severed to save the constitutional portions whenever possible. This policy is especially strong in voting cases so that the will of the people, as expressed in the Garden Kiawah annexation election, will not be nullified.

"A similar issue arose in Tornillo v. Dade Co. School Board, 458 F.2d 194 (5th Cir. 1972), where the court of appeals held that the statute should have been severed on the basis of state law."

[Hayward v. Clay, C.A. No. 76-2304, unreported order of Nov. 26, 1977, p. 10 n. 8.]

severing the unconstitutional freeholder provision, and upholding the election. *Stone* v. *Stovall,* 377 F. Supp. 1016, 1024 (N.D. Texas 1974). See also *State* v. *City of Miami Beach,* 245 So.2d 863 (Fla. 1971); *Board of Educ.* v. *Maloney,* 83 N.M. 167, 477 P.2d 605 (1970). We know of no case to the contrary.

Appellants cite a number of South Carolina cases which make general statements on the subject of severability, but those cases only emphasize that the question is not one for review by this Court. Moreover, the cases make it clear that South Carolina law favors severability, as shown by *Parker* v. *Bates,* 216 S.C. 52, 56 S.E.2d 723 (1949), where the South Carolina law on severability is discussed for several pages concluding with the observation that severability "is the rule rather than the exception." 216 S.C. at 70, 56 S.E.2d at 731. See also *Cox* v. *Bates,* 237 S.C. 198, 116 S.E.2d 828 (1960). The district court correctly applied these state law principles; the court of appeals affirmed; and this Court should leave the issue in repose.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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